

STATE OF NEW YORK
DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
ALL CORPS	:	ORDER
	:	DTA# 809351
for Redetermination of a Deficiency or for	:	
Refund of Corporation Tax under Article 9 of	:	
the Tax Law for the Years 1981 through 1987.	:	

The Division of Taxation, by this motion, seeks an order pursuant to section 3000.5(b)(1)(vi) of the Tax Appeals Tribunal Rules of Practice and Procedure dismissing the petition for failure to state a cause for relief.

The Division of Tax Appeals acknowledged receipt of a timely filed petition on March 25, 1991, which sought to challenge Conciliation Order No. 100784 dated January 11, 1991, which recomputed the statutory notices to result in tax of \$1,450.67, interest at the applicable rate and cancellation of the penalty. Petitioner's complaint was stated in the petition as follows:

- "1. Failure of New York State Department of Taxation and Finance to notify petitioner of any corporate tax requirement for the period 1981 through 1987."

The Division of Taxation asserts that the petition should be dismissed since it fails to state a cause of action upon which relief can be granted and it does not meet the requirements of 20 NYCRR 3000.3(b)(8) insofar as a copy of each notice under protest is not attached.

Section 3000.5(a)(6) of the Rules of Practice states, in pertinent part, that "[t]he appropriate sections of the CPLR regarding motions, where not in conflict with this Part, are applicable to the motion being made." Under the Civil Practice Act § 241, the predecessor to CPLR § 3014, "[a] complaint should contain a plain and concise statement of the material facts, without unnecessary repetition, on which the plaintiffs rely, without setting forth evidence by which they are to be proved. A complaint states a cause of action if, under its allegations,

evidence may be admitted which will prove a cause of action; and the plaintiff is entitled to all the facts that may be fairly implied from the allegations by reasonable and fair intendment" (Rockefeller v. Kellas, 222 App Div 368, 226 NYS 325, 327-328; see, Sage v. Culver, 147 NY 241).

The basis for a motion to dismiss in the Division of Tax Appeals is patterned after similar provisions of the CPLR. A motion to dismiss for the reason that the pleading fails to state a cause of action is permitted under CPLR § 3211(a)(7). Cases which have decided such motions deal with whether the allegations are valid given the truth of the assertion. The question to be addressed is whether there can be relief granted under any facts alleged in the complaint. In Paul v. Hogan (56 AD2d 723, 392 NYS2d 766), the court analyzed whether a cause of action existed under three possible theories of liability in a negligence action. The court noted:

"On a motion to dismiss pursuant to CPLR 3211(a)(7) the question before the court is whether a proper cause of action has been stated, not whether the cause of action can be proved (citation omitted). Accordingly, all of the factual allegations in the complaint must be assumed to be true and the pleadings as a whole are deemed to allege whatever cause of action that can be implied from its statement by fair and reasonable intendment (citation omitted)."

In its conclusion and dismissal of the complaint, the court found that "the pleadings [did] not state a valid cause of action under any possible interpretation...."

In the instant matter, the petition appeals the interest being charged in a corporate tax matter. The facts surrounding the assessment of tax are undisclosed. The petition seeks relief from the payment of interest because the Division failed to notify petitioner of the corporate tax requirement imposed on this petitioner for the years 1981 through 1987.

Tax Law § 1084 imposes interest on corporation franchise tax that is not paid on or before the last date prescribed in Articles 9, 9-A, 9-B or 9-C. There is no provision for waiver of interest for any reason (Shaffer Trucking, Inc., State Tax Commn., April 15, 1985). Nor is the Division of Taxation under any duty to notify taxpayers of an obligation to file and pay tax for activities having some connection to New York. Thus, I conclude that petitioner has not stated a cause of action upon which relief can be granted.

Based on the motion papers submitted in this matter, it is ordered that the Division of

Taxation's motion to dismiss for failure to state a cause for relief is hereby granted.

DATED: Troy, New York

ADMINISTRATIVE LAW JUDGE